In response to CLP contentions that BellSouth's market share indicates that it would gain greater dominance in the future if granted 271 authority, BellSouth notes that no specific market share is contemplated either in the Act or in the FCC's rules. (Test. of Taylor, Tr. Vol. 1, Pg. 130) BellSouth asserts that there is a difference between market share and market power (the ability of a firm to raise and maintain the market price above competitive levels for a prolonged period of time). (Test. of Taylor, Tr. Vol. 1, Pg. 128) BellSouth also notes that market share reflects market structure that has resulted from past actions, while a better predictor of market power and future conduct is conditions of entry and exit. (Test. of Taylor, Tr. Vol. 1, Pg. 132)

BellSouth concedes that effective competition means an absence of market power and that effective competition does not exist in North Carolina in the sense that the Commission no longer has to regulate local service. However, BellSouth maintains that there is vigorous and strong competition in the local market, even where BellSouth controls 94% of the facilities, because market share does not measure the vigor and strength of competition. (Test. of Taylor, Tr. Vol. 1, Pgs. 182-183) BellSouth also states that anticompetitive conduct is different from market power and that competitors' complaints of such behavior in other states are not relevant to whether local competition is feasible, viable, or permanent in any state. (Test. of Taylor, Tr. Vol. 1, Pg. 191, and Vol. 2, Pg. 9)

CLP Testimony

The CLPs argue that allowing BellSouth into the interLATA market is not in the public interest. According to the CLPs, premature entry by BellSouth in-region long distance business carries the twin dangers that BellSouth will (1) sustain its dominant position in local market and quash whatever local competition has developed thus far, and (2) use that position to remonopolize the long distance business. (Post-Hearing Matrix of WorldCom)

SECCA argues that BellSouth has added 1.9 million lines since the Act was passed, while CLPs together serve 62,000 lines or 1.4%. (Test. of Gillan, Vol. 9, Pg. 122) According to SECCA, CLP market shares are small: resale, 1.5%; UNEs, 1.5%; facilities, 0.5%. Moreover, SECCA fears reintegration (remonopolization) of the local and long distance markets if BellSouth is able to avoid opening its network to widespread competition. (Test. of Gillan, Vol. 9, Pg. 131) Citing the *Michigan Order*, SECCA contends that the Commission should focus on actual commercial activity and not rely on promises of future compliance.[208] (Test. of Gillan, Vol. 9, Pg. 132) SECCA also argues that competition has been slow to develop in North Carolina because UNE rates are not cost-based and because BellSouth opposes access to new UNE combinations. (Test. of

Gillan, Vol. 9, Pgs. 139-155) Regarding the theory that local competition grows more rapidly when an ILEC can offer long distance service, SECCA points out that local competition has not developed in Verizon's North Carolina territory.

Sprint contends that the CLPs' positions in the local market are tenuous at best. Sprint expresses concern that allowing BellSouth into the long distance market will further diminish the CLPs' ability to compete. (Test. of Stahly, Vol. 10, Pg. 419) Sprint cites the 33 CLP bankruptcies in the past year, scaled back entry plans, and low levels of capitalization as evidence that competition is not thriving. (Stahly, Vol. 10, Pgs. 422-424) Sprint counters BellSouth's reliance on the effects of granting 271 authority in New York with its own experience. According to Sprint, it offered bundled resold local service with long distance service in an effort to retain profitable long distance customer accounts in New York, hoping to subsidize local with long distance until it could profitably offer local service on a UNE basis. However, Sprint claims that it encountered many difficulties with Verizon that prevented it from successfully ramping up its UNE-based local phone service and decided to cut its losses by discontinuing marketing resold local phone service. (Test. of Stahly, Vol. 10, Pg. 430)

MCI states that it entered the local markets in New York, Pennsylvania, Texas, and Georgia before the BOCs filed for 271 authority. MCI asserts that subsequent 271 approval does not affect its strategy. MCI enters a market when that market is profitable to it. However, MCI states that once the BOC has long distance authority, the Commission has to be very strong in making sure that problems are addressed immediately. MCI cites the missing notifiers problem in New York as an example. This problem was noted in the FCC's Order, but it continued to escalate until both the New York commission and the FCC had to get involved. The New York commission also put in additional metrics to make sure that the problem would not happen again. (Test. of Lichtenberg, Vol. 10, Pgs. 283-286)

Public Advocate Positions

The Attorney General states that the FCC has indicated that the public interest determinations should include an examination of both the long distance and wholesale markets. Purely from the standpoint of the long distance market, it is in the public interest for BellSouth to be permitted entry into that market, given the high degree of market concentration and the "follow the leader" approach to pricing and policy changes. By the same token, much is to be gained by increased competition in the local market, but the potential is hard to gauge and the evidence is inconclusive. In light of this uncertainty, the Commission needs to be confident that BellSouth has met the checklist terms, that the local market is truly open to competition, and appropriate performance measures are in place prior to BellSouth's entry into long distance.

The Public Staff states that, following the FCC's guidance in the *Michigan Order*, a number of factors were examined including the nature and extent of competition in BellSouth's local market, in order to determine whether that market is and will remain open to competition. In the absence of broad-based competition, it is necessary to examine the record and weigh the evidence to determine whether the lack of such competition is the result of continuing barriers to entry, BellSouth's lack of cooperation, the business decisions of new entrants, or some other reason. While the FCC has stated "that compliance with the checklist is itself a strong indicator that long distance entry is consistent with the public interest, the FCC has consistently stated that the public interest assessment required by Section 271(d)(3)(C) is separate from determining whether a BOC satisfies the competitive checklist. The interim SQM and SEEM previously approved, and the permanent SQM and SEEM adopted in Docket No. P-100, Sub 133k, constitute these assurances. Therefore, the authorization of BellSouth to provide in-region, interLATA services is consistent with the public interest, convenience, and necessity.

The Carolina Utility Customers Association, Inc., addressed only the issue of public interest in its brief arguing that BellSouth's entry into the in-region, interLATA market is not in the public interest at this time because local competition is nascent and remains reversible.

Discussion

(a) Generally

In the *Michigan Order*, the FCC indicated that in making a case-by-case determination concerning the public interest issue, it would consider and balance a number of factors, and that the presence or absence of any one factor would not dictate the outcome of the public interest inquiry.[209] The FCC noted that the Act does not require that a BOC lose a specific percentage of market share or that there be competitive entry in different regions, at different scales, or through different arrangements before interLATA entry can be found to be in the public interest, and stated that the nature and extent of *actual local competition, while relevant*, would not be decisive.[210] The FCC also stated that the existence of other factors conducive to entry would indicate that local markets are and will remain open to competition even if broad-based competitive entry has not yet occurred.[211] Among those factors, the FCC cited the existence of performance monitoring standards and self-executing enforcement mechanisms.[212]

Following the FCC's guidance in the *Michigan Order*, this Commission examines a number of factors, including the nature and extent of competition in BellSouth's local market, in order to determine whether that market is and will remain open to competition. In the absence of broad-based competition, the Commission must examine the record and weigh the evidence to determine whether the lack of such competition is the result of continuing barriers to entry, BellSouth's lack of cooperation, the business decisions of new entrants, or some other reason.[213] Based on its extensive review of the checklist, and the complaints raised by the CLPs, the Commission believes that barriers to entry have been removed and that the local markets are open to competition as required by the Act. The Commission further believes that allowing BellSouth to compete in the long distance market will promote competition in the local and long distance markets to the benefit of all consumers.

The Commission rejects the CLPs' arguments that are based on CLP market share and financial viability. As the FCC has noted, "Congress specifically declined to adopt a market share or other similar test for BOC entry into long distance, and we have no intention of establishing one here."[214] Moreover, having found that the competitive checklist has been satisfied, we are unwilling to accept the failure of competitors to enter the market in greater numbers or with greater success as evidence that North Carolina customers should continue to wait for BellSouth to be granted interLATA authority. There are many factors beyond BellSouth's control that can explain the current state of the market, including individual CLP entry strategies and business decisions, as well as general economic conditions. Moreover, despite the misfortunes of some CLPs, the total number of CLP access lines in BellSouth's territory has increased significantly since January 2001.

The Commission also rejects the CLPs' arguments that the local telephone market is not irreversibly open and that BellSouth will backslide once 271 authority is granted. In addition to evidence of checklist compliance and commercial activity, the performance measurement and penalty mechanisms adopted for BellSouth in North Carolina provide strong assurance that BellSouth's local markets will remain open. In this regard, the Commission believes that CLP reliance on statements by FCC in the *Michigan Order* is misplaced. The FCC did state that promises of future compliance had no probative value *in demonstrating present compliance*. "In order to gain in-region, interLATA entry, a BOC must support its application with actual evidence demonstrating its *present compliance* with the statutory conditions for entry, instead of prospective evidence that is contingent on future behavior."[215] However, the context of this statement was a discussion of whether

Ameritech was presently providing nondiscriminatory access to its 911 database, not whether Ameritech's entry into the long distance market was in the public interest.

While the FCC has stated "that compliance with the checklist is itself a strong indicator that long distance entry is consistent with the public interest,"[216] the FCC has consistently stated that the public interest assessment required by Section 271(d)(3)(C) is separate from determining whether a BOC satisfies the competitive checklist.[217] The FCC has also stated that it considers assurances of future performance to be probative evidence that a BOC will continue to meet its 271 obligations and that its entry would be in the public interest.[218] The Commission concludes that the interim SQM and SEEM and the permanent SQM and SEEM adopted in our Docket No. P-100, Sub 133k, constitute just such assurances.

In the *Initial 271 Order*, we stated that. . .

> the Commission strongly favors early BellSouth entry into the interLATA market because (1) substantial public benefits are to be realized from the entry of BellSouth into the interLATA market through increased (i.e., more effective) long distance competition, (2) such entry will serve to encourage the CLPs to compete in the local market and thereby accelerate the development of local exchange competition to a truly effective level, and (3) there is no longer a compelling need from the standpoint of public policy to exclude BellSouth from providing interLATA long distance service in North Carolina through a separate affiliate and subject to the Section 272 safeguards when other ILECs (or their affiliates) are allowed to provide such service.

The Commission reaffirms this statement based upon the record before it today.

(b) Price Squeeze

It is relevant in the public interest analysis to address a few words with respect to the "price squeeze" argument. The intervenors in this docket actually made no substantial mention in the evidentiary hearing of the price squeeze argument, although that issue was raised afterward by WorldCom in its February 5, 2002, filing seeking among other things, to re-open the Section 271 proceeding. Therefore, any assertion of a price squeeze is unproven at the state inquiry level. Proponents of the price squeeze argument have maintained that competitors cannot profitably enter a state's telephone market using the UNE-platform because UNE rates are allegedly inflated. The price squeeze argument has only received prominence lately in the wake of the Sprint v. FCC ruling relating to the *SWBT Kansas/Oklahoma Order*. There the Circuit Court remanded the FCC's rejection of the price squeeze issue for reconsideration, but did not vacate the Order.

Given the relative absence of record at this time before us, we would simply make a few observations about the price squeeze argument and its relevance to the public interest issue.

First, in both the *Verizon Vermont Order* and the *BellSouth Georgia/Louisiana Order*, the FCC indicated that it would not be in the public interest to deny a Section 271 application because the local rates are low. The FCC observed that in many states with significant rural areas, there is an intentional policy to keep retail rates affordable.

Second, the FCC noted that the Telecommunications Act itself contemplates the existence of subsidized local rates in high cost areas and addresses such potential price squeezes through the availability of resale. Thus, the effect of resale must be considered in assessing whether a competitor is "doomed to failure" because of a price squeeze.

Third, the competitive market is evolutionary. That is, the existence of local rate subsidies might mean that initially competition would be more prevalent in business markets and for higher-end residential customers. This competition will, however, tend to erode the subsidies and create pressure to rebalance local rates, thereby creating more favorable conditions for local residential competition.

Fourth, the Commission also believes that it may be possible for competitors to profitably serve customers in North Carolina using our deaveraged UNE-P rate for Zone 1 of $13.03.

Lastly, the Commission notes that BellSouth has on May 7, 2002, filed a revised SGAT price list which, besides inserting the permanent UNE rates ordered to date by the Commission, reduced nonrecurring UNE rates to match those ordered in Louisiana and eliminated the recurring and nonrecurring rates associated with UNE vertical features. The Commission has also scheduled for later this year a new UNE proceeding based upon consideration of BellSouth's latest cost model. The first action leads to, and the second action is expected to lead to, lower UNE rates.

Accordingly, the Commission sees no reason to warrant disapproval of BellSouth's application based on price squeeze allegations.

(c) Assurance of Future Compliance

The FCC has repeatedly recognized the need for appropriate mechanisms to assure compliance by RBOCs of their Section 271 obligations after Section 271 relief is granted. Most recently, the FCC stated in the *GALA II Order* approving BellSouth's Section 271 applications for Georgia and Louisiana

> . . . Although it is not a requirement for section 271 authority that a BOC be subject to such performance assurance mechanisms, the Commission previously has found that the existence of a satisfactory performance monitoring and enforcement mechanism is probative evidence that the BOC will continue to meet its section 271 obligations after a grant of such authority. [¶291 with footnotes omitted]

The Commission firmly believes that approval of BellSouth's application to provide interLATA long distance service is a beginning, not an end. The Commission has therefore enacted many safeguards, and the Commission will closely monitor BellSouth's performance on a continuing basis under them. These safeguards include:

- A comprehensive set of performance measures established by the Commission in Docket No. P-100, Sub 133k;
- Annual, independent third-party audits of the performance measurement plan and remedy plan;
- Annual Commission reviews of the performance measurement plan and remedy plan;
- Self-effectuating penalty provisions for key, customer-impacting measures;
- Monetary penalties are established in two Tiers (Tier 1 and Tier 2). A Tier 3 penalty similar to the one in the Georgia and Louisiana penalty plans whereby BellSouth will voluntarily suspend additional marketing and sales of long distance services if it fails to meet a specific number of the Tier 3 submetrics for three consecutive months;
- Compulsory Commission-imposed penalties under N.C.G.S. 62-310(a); and

- The vigorous investigation of complaints brought under N.C.G.S. 62-73, together with an expectation that BellSouth will expeditiously work toward the resolution of such complaints.

The existence of these performance monitoring and enforcement mechanisms provide probative evidence to ensure that BellSouth will continue to meet its Section 271 obligations after a grant of authority is made.

We believe that our performance measurements plan and remedy plan provide sufficient incentives to foster post-entry checklist compliance. The FCC noted in its *GALA II Order*, as follows

> As in prior section 271 orders, our conclusions are based on a review of several key elements in any performance assurance plan: total liability at risk in the plan; performance measurements and standards definitions; structure of the plan; self-executing nature of remedies in the plan; data validation and audit procedures in the plan; and accounting requirements. [¶295 with footnotes omitted]

The Commission notes that our remedy plan exposes BellSouth to $140 million in annual penalties based on 1999 net revenues or 36% of BellSouth's annual North Carolina net operating revenues. Furthermore, there is a Tier 3 penalty in which BellSouth will suspend additional marketing and sales of long distance services if it fails to meet certain Tier 3 submetrics for three consecutive months. We believe that our plan provides adequate incentives to prevent BellSouth from backsliding.

Further, the Commission notes that the FCC has recently established a Section 271 Compliance Review Program. In a June 6, 2002 Public Notice, the FCC stated

> The Federal Communications Commission's Enforcement Bureau has established a Section 271 Compliance Review Program. As Bell Operating Companies ("BOCs") receive authority to provide long distance service within their regions, the staff of the newly formed Section 271 Compliance Review Team will now monitor on a more structured and systematic basis the companies' compliance with the market opening conditions of section 271 of the Telecommunications Act of 1996. This Program will augment the Enforcement Bureau's existing 271 oversight and will enhance the Bureau's ability to identify and act upon non-compliant conduct in a timely and appropriate manner.

Finally, the Commission also notes that the FCC has stated in its discussion of assurances of future compliance for BellSouth in Georgia and Louisiana in its May 15, 2002 *GALA II Order*

> . . . We also stand ready to exercise our various statutory enforcement powers under section 271(d)(6) quickly and decisively to ensure that the local market remains open in Georgia and Louisiana. [¶300]

We echo these sentiments. We expect BellSouth to strictly comply with the performance measurements we have enacted and will utilize our enforcement powers to ensure that this is the case.

Based on the foregoing, the Commission believes that there are adequate mechanisms in place, both at the federal level and the state level, to ensure that BellSouth continues to comply with TA96 after Section 271 approval is granted. The Commission cannot stress enough how critical post-271 monitoring is, and it is the Commission's intent to continuously and relentlessly monitor BellSouth's adherence to TA96.

Conclusion

The Commission concludes that the authorization of BellSouth to provide in-region, interLATA services is consistent with the public interest, convenience, and necessity.

APPROVAL OF BELLSOUTH'S SGAT

In addition to negotiating and arbitrating private agreements with new entrants, the Act affords ILECs the right to file an SGAT. The SGAT provides a set of general terms and conditions from which any competitor in North Carolina can order interconnection facilities and UNEs or can resell BellSouth services to compete with BellSouth in the local market. Once approved or permitted to take effect by the Commission, CLPs can use the SGAT to enter the local market without having to negotiate an interconnection agreement with an ILEC. In accordance with the Act, BellSouth filed a new SGAT in this proceeding. (Cynthia K. Cox Hearing Exhibits, Revised Exh. CKC-5)

To be approved, the Commission must determine whether the SGAT complies with Section 251 and the pricing standards for interconnection, unbundled network elements, and resale contained in Section 252(d). This is the same standard applied by this Commission for approval of arbitrated agreements. *Compare* 47 U.S.C. 252(f)(2) with

47 U.S.C. 252(e). The Act requires that BellSouth offer: number portability; dialing parity; access to telephone numbers, operator services, directory assistance and directory listings; access to rights-of-way; reciprocal compensation for the transport and termination of telecommunications services; interconnection at any technically feasible point; resale of retail services at an avoided cost discount; and access to unbundled network elements at cost-based rates. Accordingly, we conclude that the rates, terms, and conditions of interconnection, unbundling, and resale in BellSouth's SGAT satisfy the requirements of Sections 251 and 252(d) of the Act.

The Act also states that a BOC may use an approved SGAT under Track A (47 U.S.C. 271(c)(2)(A)) to supplement one or more binding agreements to demonstrate full compliance with the 14-point competitive checklist under that Track. *Evaluation of the United States Department of Justice, In re: Application of SBC Communications, Inc. et al. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region InterLATA Services in the State of Oklahoma,* CC Docket No. 97-121, ¶ 22-24 (filed March 16, 1997).

The Commission finds and concludes that BellSouth's SGAT meets the requirements of the checklist and gives BellSouth a "concrete and specific legal obligation" to furnish each checklist item to competitors.

Furthermore, on May 7, 2002, BellSouth filed a revised SGAT Price List in Docket Nos. P-55, Sub 1022 and P-100, Sub 133d. (Attachment A was revised on May 9, 2002, to correct an error for rate element J.S.1.) The revised price list inserted into the SGAT the permanent UNE rates ordered to date by the Commission and reduced nonrecurring UNE rates to match those ordered in Louisiana. BellSouth also eliminated the recurring and nonrecurring rates associated with UNE vertical features. BellSouth requested that the Commission approve the revised SGAT Price List as cost-based and appropriate at this time based on the current market, economic, and regulatory conditions in North Carolina. After careful consideration, the Commission concludes that good cause exists to allow the proposed SGAT Price List revisions to go into effect.

Lastly, the Commission notes that on June 17, 2002, BellSouth filed amendments to its SGAT to reflect the decision in *Verizon Communications, Inc. v. FCC*.

IT IS, THEREFORE, ORDERED as follows:

1. That BellSouth is found to have satisfied its obligations under Section 271(d)(2)(B) of the Telecommunications Act of 1996, as well as its obligations

under Section 271(c)(2)(B)(i)-(xiv) [Competitive Checklist] and Section 271(d)(3)(A) [Track A]; and BellSouth's entry into the interLATA long distance market is furthermore found to be consistent with the public interest as required by Section 271(d)(3)(c).

2. That, with regard to potential anticompetitive marketing practices, BellSouth shall abstain from any marketing activities directed to a customer for seven days after the customer switches to another local telephone company; that BellSouth's wholesale divisions are prohibited from sharing information concerning customer switches with its retail division; and that BellSouth shall not include marketing information in the final bill sent to a customer that has switched providers.

3. That, with respect to UNE combinations, BellSouth shall make available to competitors such combinations as are required by pertinent FCC rules and relevant court decisions, including *Verizon Communications, Inc. v. FCC*, ___U.S.___ (2002).

4. That BellSouth's revised SGAT and its revised SGAT Price List (filed May 7, 2002; corrected May 9, 2002) be approved. It is furthermore provided that BellSouth's rates as denoted in the SGAT for remote terminal and virtual collocation elements, cable records, the assembly point arrangement and UCL-ND, including engineering information and testing, are hereby approved as interim rates subject to true-up, the SGAT to be revised accordingly.

5. That, in accordance with the Commission's *Notice of Decision* in this docket, as of May 23, 2002, the performance measurement plan and penalty plan in effect in Georgia have been adopted for BellSouth on an interim basis until the effective date of the North Carolina performance measurement plan and penalty plan. As the Commission has already ruled, any penalty payments are subject to true-up as of the effective date of the North Carolina plans.

ISSUED BY ORDER OF THE COMMISSION.

This the 9th day of July 2002.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

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